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ERRONEOUSLY MEANDERED LAKESHORE—THE STATUS OF THE LAW AS IT AFFECTS TITLE AND DISTRIBUTION

INTRODUCTION

Modern affluence and increased interest in outdoor recreational activities have spurred the demand for lake and country real estate in recent times. Wisconsin's northern woodlands, particularly those bordering the numerous lakes of the region, have been especially popular. Disgruntled urbanites are discovering the many pleasurable aspects of country living and rural landowners are enjoying the prosperity which land development brings. However, progress has its price, and this recent interest in northern Wisconsin property has renewed an old legal problem which is certain to become a source of controversy as more people seek their own piece of vacation land. Many unsuspecting purchasers of such lands may one day find themselves involved in disputes over title to parcels of lakeshore property which were either mistakenly or fraudulently omitted from the original government surveys and plats. Unfortunately, the rules of law applicable to such disputes are cryptic and uncertain, although recently the Wisconsin Supeme Court has begun to reduce the confusion. This article will examine and discuss these rules and their application to contemporary title problems in Wisconsin.

ORIGIN OF THE PROBLEM

While the forests that once stretched across most of Wisconsin were originally seen as the state's most valuable resource, there are few who would dispute that the state's lakes and streams are equally important today. Wisconsin's northern counties have one of the largest concentrations of lakes anywhere on earth, a result of the last great glacial advance across the northern United States.[1] The presence of these numerous lakes caused many hardships for the private surveying crews which contracted with the federal government to survey the region between 1830 and 1866. These crews, often poorly trained and inexperienced, were frequently hard pressed to

1. For a discussion of Wisconsin's glacial history, see LaBastile, *On the Trail of Wisconsin's Ice Age,* NAT'L GEOG., Aug. 1977, at 189.

keep ahead of timber trespassers. This pressure, combined with the inherent difficulty of surveying a wilderness dotted with lakes and streams, led to a large number of mistakes in charting the meander lines of northern lakes.[2]

The government officials supervising the projects were not particularly concerned with the exact detail of these lake boundaries, as they were primarily interested in ascertaining the approximate acreage so that the forested uplands could be sold.[3] The surveyors merely submitted field plats of their work and their notes to the government. The survey would be accepted unless the plats did not correspond to the notes. Draftsmen then divided the plats by quarter lines and subdivided lands which were less than complete quarter sections because of a meandered body of water into government lots.[4] The absence of an effective check on the work of the surveying crews resulted in many lakes being erroneously or fraudulently misrepresented on the official plats.

Most of the early disputes which arose because of inaccurate surveys involved timber companies quarreling over boundaries to tracts of standing timber. These companies were eager to move on to uncut areas as soon as the timber could be removed, and usually had no interest in becoming entangled in lengthy court battles over title to the timberlands.[5] Those few disputes that did reach the Wisconsin Supreme Court usually

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2. Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale . . ., the water course, and not the meander-line, is the boundary.

St. Paul & Pac. R.R. v. Schurmeier, 74 U.S. (7 Wall.) 272, 286 (1868).

Meander lines are not per se boundary lines, and were not so intended. They are a series of straight lines, roughly blocking out the sinuosities of the banks of larger bodies of waters and streams, and were run for the purpose of computing the area of lands bounded on such waters.

Bade, *Title, Points and Lines in Lakes and Streams,* 24 MINN. L. REV. 305, 306 (1940).

For similar definitions of "meander line" see Weaver v. Knudson, 23 Wis. 2d 426, 430, 127 N.W.2d 217, 220 (1963) and BUREAU OF LAND MANAGEMENT, MANUAL OF SURVEYING INSTRUCTIONS § 226, at 230 (1947).

3. *See generally,* Schultz v. Winther, 10 Wis. 2d 1, 101 N.W.2d 631 (1960).

4. The system for the survey of public lands is set forth in 43 U.S.C. §§ 752, 753 (1970). The federal scheme of surveying is described in H. Tuttle, Title to Wisconsin Lakelands Not Shown on the Government Plat (Feb. 16, 1928) (paper presented to the Wisconsin Society of Engineers).

5. Although litigation was infrequent, some cases did materialize. *See, e.g.,* Northern Pine Land Co. v. Bigelow, 84 Wis. 157, 54 N.W. 496 (1893); Whitney v. Detroit Lumber Co., 78 Wis. 240, 47 N.W. 425 (1890).

involved controversies arising after lumber companies had cleared most of the available forest land, and frequently involved title to meandered lakeshore property.

The development of the law on the subject was sporadic and the early decisions were fraught with inconsistency—a hobgoblin that has remained with the law to this day. To better understand the present law on the subject, it is necessary to analyze the early cases which are responsible for much of the current confusion.

THE CHOICE OF LAW QUESTION

One of the first problems encountered in any question involving boundaries or title to erroneously meandered property in Wisconsin is determining whether to apply state or federal law. When confronted with this question, the courts have given contradictory answers. The decisions of the Wisconsin Supreme Court have not settled the issue.

In the 1899 case of *Mendota Club v. Anderson,*[6] the Wisconsin court declared that the state could not apply its own law to determine the extent of land grants by the United States government. Yet, eleven years later the court seemed to modify that language by stating in *Farris v. Bentley*[7] that it is "well settled that where the United States grants lands bounded by streams and makes no reservation or restriction, the grant will be given effect according to the law of the state in which the land lies." Subsequent Wisconsin cases have at times applied both of these rules.[8] However, much of this apparent inconsistency can be resolved by looking to the federal decisions which served as precedent for the two rules.

The two United States Supreme Court cases cited most often in Wisconsin decisions on the choice of law question are *Hardin v. Jordan*[9] and *Mitchell v. Smale.*[10] The issue in the *Hardin* case was whether the title of a riparian owner[11] ex-

6. 101 Wis. 479, 78 N.W. 185 (1899).

7. 141 Wis. 671, 674, 124 N.W. 1003, 1004 (1910).

8. *See, e.g.,* Blatchford v. Voss, 197 Wis. 461, 219 N.W. 100 (1929) (following *Farris);* Reedal v. Brothertown Realty Co., 200 Wis. 465, 227 N.W. 390 (1930) (following *Mendota).*

9. 140 U.S. 371 (1891).

10. 140 U.S. 406 (1891).

11. In J. GOULD, TREATISE ON THE LAW OF WATERS, 297 (3d ed. 1900) the author notes that "the word 'riparian' is relative to the bank, and not to the bed of the stream." In

tended to the center of a nonnavigable lake or stopped at the water's edge. Declaring that state law governed the determination, the Court referred only to the states' right to regulate submerged lands which belong to them in their sovereign capacity.[12] It thus seems that the rule has been misapplied to cases involving unsurveyed uplands, where the critical inquiry is whether title extends to the water's edge. The status of title to the submerged lands lying beyond the high water mark should not affect the determination of ownership of the adjacent lands that have never been covered by water. Much of the difficulty experienced in Wisconsin and throughout the country[13] is attributable to extensions of the *Hardin* doctrine to inappropriate fact situations.

In *Mitchell v. Smale*[14] the plaintiff claimed title under a patent issued to his ancestor to a twenty-five acre peninsula which had been omitted from the official government survey. The Court there held that the authority of the United States to dispose of public lands was a matter of federal law and that federal law determines the extent of federal patents. Since the disputed parcel in *Mitchell* did not involve any previously submerged areas, the extent of the grant was not determined under state law.

Much of the confusion in the early Wisconsin cases is attributable to the court's failure to distinguish the factual bases of the *Hardin* and *Mitchell* rules before applying them to the cases presented. Several recent cases illustrate the proper application of the Supreme Court's choice-of-law rules.

In *Hughes v. Washington*[15] the United States Supreme Court considered the status of title to land formed by accretion along property bordering on the Pacific Ocean. The petitioner's

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this article, the ownership rights and privileges in lakes will be referred to as "riparian" because of its common usage, even though the term "littoral" more accurately describes these rights and privileges.

12. The principle case supporting this proposition is Barney v. Keokuk, 94 U.S. 324 (1876), in which the United States Supreme Court held that the states' jurisdiction in such cases was limited to riparian rights incidental to their title to submerged lands which were acquired at statehood.

13. The large number of lakes in Minnesota have created problems with meandered shoreline similar to those encountered in Wisconsin. For a discussion of the law in that state see Bade, *Title, Points and Lines in Lakes and Streams*, 24 MINN. L. REV. 305 (1940).

14. 140 U.S. 406 (1891).

15. 389 U.S. 290 (1967).

predecessor in interest received title to the oceanfront property through a United States government grant. However, the State of Washington also claimed ownership to the accreted lands by virtue of its statehood. A majority of the Court held that the owner of shoreline property bounded by navigable water who claims under a federal grant acquires the right to accretions. In so ruling, the Court declared that the question was one of federal law. The decision was based upon the principle announced in *Borax, Ltd. v. Los Angeles,*[16] that the validity and extent of federal grants, and the location of the boundary between upland and tideland are questions which must be determined under federal law.

Mr. Justice Stewart, concurring in *Hughes,* explained that,

> the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners.[17]

Today, the Supreme Court's position on the question is rather easily summarized: Federal law governs questions of the existence and extent of federal grants, and state law determines the riparian rights incidental to the grant.[18]

In *Bourgeois v. United States*[19] a United States Court of Claims recently ruled that title to an unsurveyed island in Michigan belonged to the owner of the shoreline adjacent to the

16. 296 U.S. 10 (1935). The Court concluded that a question regarding the limit of land conveyed concerns the validity and effect of an act done by the United States and thus must be governed by federal law. *Id.* at 22. *See also* Kean v. Calumet Canal Co., 190 U.S. 452, 461 (1903), where the dissent engaged in a thorough discussion of the early law on the subject.

17. 389 U.S. at 295.

18. Further support for this proposition can be found in the case of Wilcox v. Jackson, 38 U.S. (13 Pet.) 266, 276 (1839), wherein the Supreme Court stated succinctly,

> Whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States, but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to the State legislature, so far as that legislture is consistent with the admission that the title passed and vested according to the laws of the United States.

See also St. Paul & Pac. R.R. v. Schurmeir, 74 U.S. (7 Wall.) 272 (1868); Paige v. Peters, 70 Wis. 178, 35 N.W. 328 (1887).

19. 545 F.2d 727 (Ct. Cl. 1976).

island as the successor in title from the original patentee. The court noted that when reviewing a federal grant, interpretation of the government's intent must involve an analysis of federal case law, since the statutes are silent as to the construction of federal patents.[20] The court held that under the federal decisions "if the intent of the grantor is ambiguous and the government grants shoreland along non-navigable waters, it also passes title to islands according to the law of the state in which the property is located."[21] The court drew a distinction between the cases holding federal law pre-emptive and those declaring state property law controlling. In the case of an unsurveyed island situated in nonnavigable waters the question of title to the island is governed by state law because of the states' right to determine title to submerged lands within their borders.[22] However, islands surrounded by navigable water are governed under federal law because of the federal government's interest in the navigability of national waters.

The *Bourgeois* rationale can be extended to cover the selection of law problem in cases involving omitted Wisconsin shoreline. When disputes over unsurveyed lands bordering meandered lakes cannot be resolved through interpretation of the United States patent, federal law looks to the law of the state in which the disputed land is situated. As will be discussed below, the federal decisions are very clear on the interpretation of grants bordering meandered lakes. Thus, state law does not determine the extent of federal patents where the dispute does not involve title to submerged lands or lands below the mean high water mark. However, once it has been determined that title has been transferred from the federal government, the property is subject to the state's rules of real property.[23] Thus, state law governs disputes over boundaries between parcels of land which were omitted from the official plat due to an erroneously meandered body of water.[24]

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20. *Id.* at 729. *See also* Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973).

21. 545 F.2d at 731. *See also* Scott v. Lattig, 227 U.S. 229 (1913).

22. *See, e.g.*, Barney v. Keokuk, 94 U.S. 324 (1876).

23. It should be noted that in cases where a subsequent resurvey of meandered lakeshore reveals land that was technically omitted from the original plat because of an erroneous survey, one holding a patent issued prior to January 21, 1953, who has held the land in peaceful, adverse possession may purchase that land and receive a patent. 43 U.S.C. § 1221 (1970).

24. Wisconsin has a specific statute applicable to disputes over boundaries of tracts of land bordering erroneously meandered lakes which also provides for the distribution

THE FEDERAL PRESUMPTION

As indicated earlier, federal law determines the validity and extent of federal grants.[25] *Mitchell v. Smale,*[26] the leading case on this subject, provides a clear statement of the federal presumption regarding the extent of such grants. Discussing the rights of the original patentee to the unsurveyed peninsula, the Court stated,

> The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour, produced an average result, clearly approximating to the truth as to the quantity of the upland contained in the front lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deducted therefrom and the surrounding front lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and are bounded by the lake or stream.[27]

Thus, the owner of abutting lands is conclusively presumed to hold to the actual shoreline absent a showing of fraud. *Hardin v. Jordan*[28] further clarified the rule with its statement that the meander lines are run "for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines."[29] The presumption is based on the rationale that there is no reason why the government would reserve strips of land along meandered lakes after conveying title to all surrounding lands. The meander line was simply a convention designed to provide a reasonably accurate means of approximating the acreage in government lots so that the purchaser could be

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of such lands where the same parcel is being claimed by two or more parties. WIS. STAT. § 30.10(4)(b) (1975).

25. *See, e.g.,* Whitaker v. McBride, 197 U.S. 510, 511 (1905); Kean v. Calumet Canal Co., 190 U.S. 452, 456 (1903); Fontenell v. Omaha Tribe of Nebraska, 298 F. Supp. 855, 861 (D. Neb. 1969); and text accompanying notes 15-18, *supra.*

26. 140 U.S. 406 (1891).

27. *Id.* at 413.

28. 140 U.S. 371 (1891).

29. *Id.* at 380.

charged an appropriate amount. It may not be considered a boundary for purposes of limiting the extent of a federal grant.[30]

WISCONSIN INTERPRETATIONS OF THE FEDERAL PRESUMPTION

Over the years the Wisconsin courts have not applied the federal presumption with great fidelity. Perhaps the most striking Wisconsin aberration is the so-called "eighth-line" rule. The rule developed from *Whitney v. Detroit Lumber Co.*,[31] where the court recognized that the patentee of lands shown on the official plat to be bounded by lakeshore is presumed to take title to the shore, but held that one cannot extend the search for such shoreline beyond the next government subdivision line. Later, in *Lally v. Rossman*,[32] the patentee's search for the actual shoreline was further restricted when the court declared that the patentee must stop his search for the water's edge at the next eighth-line.

The eighth-line rule imposes an obvious limitation on the extent of federal grants in contravention of the federal presumption. When applying this test, the courts fail to give proper deference to the government's intent or the circumstances surrounding the original conveyance; the government is simply presumed not to have intended to distribute land beyond the next eighth-line.[33] No attention is given to the quantity of omitted land, so narrow strips of valuable land lying between the subdivision line and the water's edge could remain technically ungranted property.

At one time it appeared that the eighth-line rule had been abandoned in Wisconsin. In *Brown v. Dunn*,[34] the Wisconsin Supreme Court appeared to adopt the federal presumption when it held that the lakeshore is the boundary "however distant or variant from the position indicated for it by the meander line."[35] There was mention of both the *Whitney* and *Lally*

30. This rule was clearly stated in St. Paul & Pac. R.R. v. Schurmeier, 74 U.S. (7 Wall.) 272, 286 (1869), which has been cited in most decisions discussing title to trans-meander property. *See also* United States v. Zager, 338 F. Supp. 984 (E.D. Wis. 1972).

31. 78 Wis. 240, 47 N.W. 425 (1890).

32. 82 Wis. 147, 51 N.W. 1132 (1892).

33. There is some support for this position in Security Land & Exploration Co. v. Burns, 193 U.S. 167 (1904), although there is no language that would support the proposition that the crossing of a government subdivision line is to be construed as more than one factor that may be considered in making a determination of governmental intent where that intent is vague.

34. 135 Wis. 374, 115 N.W. 1097 (1908).

35. *Id.* at 377, 115 N.W. at 1098.

cases in the opinion, yet the eighth-line rule was conspicuously omitted. However after a brief respite, the rule reappeared and was approved in *Wisconsin Realty Co. v. Lull*,[36] which held that the owner's right to move beyond the meander line to the natural boundary (in this case a river) was subordinate to a governmental subdivision line if one had to be crossed to reach the water.

The eighth-line rule was finally laid to rest after the rehearing of *Blatchford v. Voss*,[37] where the Wisconsin Court decided that governmental intent is the controlling factor when interpreting the extent of a federal grant shown to be bounded by a meandered lake. Although all of the earlier Wisconsin cases considering the extent of federal grants have mentioned governmental intent, this factor had never been given conclusive effect—especially when a government subdivision line had to be crossed to reach the shoreline.

Passage of section 30.10(4)(b) by the Wisconsin legislature in 1931[38] should have remedied much of the uncertainty over the extent of federal patents since it codified the federal presumption:

> The boundaries of lands adjoining waters and the rights of the state and of individuals with respect to all such lands and waters shall be determined in conformity to the common law so far as applicable. But in the case of a lake or stream erroneously meandered in the original U.S. government survey, the owner of title to lands adjoining the meandered lake or stream, as shown on such original survey, is *conclusively presumed to own to the actual shore lines* unless it is first established in a suit in equity, brought by the U.S. government for that purpose, that the government was in fact defrauded by such survey. If the proper claims of adjacent owners of ri-

36. 177 Wis. 53, 187 N.W. 978 (1922).

37. 197 Wis. 468, 222 N.W. 804 (1929). *See also* Baackes v. Blair, 223 Wis. 83, 269 N.W. 650 (1936).

38. The section was created in response to federal legislation passed in 1925 which authorized the Secretary of Interior to dispose of lands that were determined to have been omitted from the official government plat. The act applied to Wisconsin alone, and allowed for redistribution of trans-meander property without a prior judicial determination of fraud. *See* 43 U.S.C. § 994 (1970).

For a complete discussion of the circumstances which gave rise to the passage of the statute, see O'Melia & Kaye, The Status of Title to Lands Bordering on Erroneously Meandered Lakes (brief presented to the Wisconsin Legislature in connection with ch. 154, Laws of 1931) (Wisconsin Legislative Reference Library).

parian lots of lands between meander and actual shore lines conflict, each shall have his proportion of such shore lands.[39]

The first clear discussion[40] of the statute appears in *Kind v. Vilas County*.[41] There, three adjacent lots of approximately 77.5 acres were shown by the official government plat to be bounded by a small lake. However, a private survey indicated an error in the meandered shoreline totaling 4.6 acres. The plaintiff, owner of one of the lots, claimed that his patent included the actual shoreline. However, the county owned the other two lots and claimed title to the disputed lakefront under its original grant. Significantly, the court in *Kind* noted that there need not always be only a single "winner" in disputes between adjacent landowners who claim title to the same lakeshore under the statute. Finding the case controlled by the last sentence of section 30.10(4)(b), the court said, "we do not close the door to a 100% award of a disputed parcel to one of two or more disputing adjoining landowners. However it appears to us that such award would have a finding that only one claim was a 'proper claim' under the statute."[42] The court then interpreted the statute to allow proportionate awards of the shoreline based on "the factors that have been held relevant to a search for the intent of the government at the time of making the original survey."[43] The court went on to state that "previous cases dealing with intent remain relevant in seeking guideines for an equitable, proportional division of the disputed property."[44]

These pronouncements must be read in the narrow sense in which they were intended to apply in order to avoid a revival of the contradictory cases which were the law prior to the en-

39. WIS. STAT. § 30.10(4)(b) (1975) (emphasis added).

40. Reference to the statute was conspicuously absent from Weaver v. Knudson, 23 Wis. 2d 426, 127 N.W.2d 217 (1964), which followed federal decisions in holding a lake's actual shoreline was the boundary where the lake had been erroneously meandered. While the court did not apply the statute, although it seemed appropriate, the case may be valuable for its holding that title to two parcels of land separated by a nonmeandered lake passed to the patentee of the government lot within which the two unconnected parcels were located.

In Blatchford v. Voss, 197 Wis. 461, 219 N.W. 100 (1929), the court expressly refused to decide whether a government lot could be composed of two parcels of land separated by a body of water.

41. 56 Wis. 2d 269, 201 N.W.2d 881 (1972).

42. *Id.* at 276, 201 N.W.2d at 885.

43. *Id.*

44. *Id.* at 277, 201 N.W.2d at 885.

actment of section 30.10(4)(b). It should be noted that the court in *Kind* was referring only to those surrounding circumstances which may be considered by a trial court in making an equitable division of lakeshore that is claimed by two or more owners holding under valid federal patents. By its unfortunate reference to the eighth-line rule cases, the court did not intend to reinstate it as an absolute rule. Such a reading of the decision would be in direct conflict with section 30.10(4)(b) and the federal law on the subject. In addition to the eighth-line test, the court listed other factors to be considered in apportioning such lands: the possibility of one or more claimants being deprived of lake frontage, the total area of omitted land, the topography and value of the land, the amount and quality of each claimant's upland, and the amount of land held by each claimant that actually borders on the disputed parcel.[45]

The *Kind* court's ruling that section 30.10 of the statutes determines the boundaries of the disputed parcel after the claimants establish the validity of their claims comports with federal case law. Wisconsin's early decisions on meandered lakes should not today be considered a source of precedent for the courts to follow. Rather, they only outline factors to be considered in making a proportionate distribution among the adjoining land owners. While a court may still award an entire disputed parcel to one claimant, it is no longer required to do so.

A recent discussion by the Wisconsin court on the problem of erroneously meandered lakes presented a unique question. *State Commissioners of Board of Public Lands v. Thiel*[46] involved a dispute over ownership to two parcels of land which together totaled less than ten acres. The original survey plat had shown the state and the defendants as owners of adjacent lots bounded by a meandered lake although a subsequent survey revealed a substantial variance between the actual lake and the lake as it appeared on the official plat. Most of the government lot held by the state was covered by the lake, and only two triangular parcels, located at each of the lots' eastern corners remained above water. The two parcels were separated by the lake.

45. *Id.* at n.2.
46. 82 Wis. 2d 276, 262 N.W.2d 522 (1978).

The state argued that its grant did not stop at the lake's shore but extended across the meandered body of water to include the southeast corner of the lot. Ownership of that corner would make the state an "adjacent landowner" within the meaning of section 30.10(4)(b) to the second disputed parcel. The second parcel consisted of technically omitted land adjacent to the defendant's lot and the disputed corner claimed by the state. Arguing under the statute, the state contended that it should be entitled to a proportionate distribution of the second tract.

In its claim to title to the southeast corner, the state urged the court to recognize an exception to the conclusive presumption. If the presumption were held to control, the state would be precluded from both parcels since the original plat showed the southern end of its lot to be bounded by the meandered lake. The court concluded that no additional exception to the presumption existed,[47] and that the state's claim for a proportionate share of the second tract was therefore without merit. The state was not an adjacent owner. It was noted that "[m]eander lines have never been used so as to reach across a body of water and take in a parcel on the opposite shore."[48] However, the court then qualified that conclusion with its statement that "it is not impossible for a lot to be composed of two parcels separated by a body of water."[49] Nevertheless,

47. Section 30.10 and the federal cases expressly recognize fraud as the only exception to the presumption. The fraud exception is discussed at pp. 527-32 *infra*.

In *Thiel*, the court specifically refused to extend the exception, stating that "[t]he principle that grossly erroneous meander lines are to be treated as boundaries was developed in response to surveys which erroneously *omitted* large areas of high land." 82 Wis. 2d at 286, 262 N.W.2d at 529. The court distinguished this principle from the facts established in the case:

> In the instant case, however, the erroneous survey had an opposite effect; the original plat of survey grossly *overstated* the size of the lot. This court has never applied the exception, or treated meander lines as boundaries, in similar circumstances. Nor has our research identified any such case in other jurisdictions. Because the exception was developed to accommodate a different factual situation, and in response to different policy concerns, it should not be arbitrarily extended to the instant case.

Id. at 287, 262 N.W.2d at 529.

48. *Id.* at 288, 262 N.W.2d at 530.

49. *Id.* The court recognized the preference for regularly shaped parcels and the rectangular method of surveying and platting employed by the government. However, a distinction was made for disputes involving nonmeandered bodies of water: "In such cases, this court has held that conveyance by patent of a government lot passes title to all upland in the designated lot, including unconnected parcels cut off from the

after it declared that "the intent of the government in making the original grant is always the controlling consideration in determining the boundaries of the grant,"[50] the court found that government intent for such a conveyance was lacking in the present case.

The *Thiel* case has reaffirmed the applicability of section 30.10(4)(b) to title disputes involving erroneously meandered lakeshore. This reinforcement, coupled with the court's strict adherence to the conclusive presumption contained in the statute makes it a valuable case. However, the question did not arise as to the significance to be attached to governmental subdivision lines which run between the meander line and the actual shore. The answer to this question remains somewhat unsettled by the court's reference to early cases which dealt with government intent[51] and its statement that "the meander lines will be considered boundaries where a governmental intention to make them boundaries is shown."[52]

FRAUD—THE EXCEPTION TO THE RULE

Throughout this article it has been stated that absent a showing of fraud, a landowner depicted on the official plat as owning to the shore of a meandered lake is conclusively presumed to own to the water's edge. A discussion of the circumstances in which fraud will preclude a presumed riparian owner from obtaining title to claimed shoreline is necessary for a complete understanding of the law affecting title to these technically omitted lands. Section 30.10(4)(b) mentions fraud as the exception to the conclusive presumption, and also states that only the United States, as the original grantor, can establish fraud to defeat a landowner's claim to omitted lands. The courts have experienced a great deal of difficulty determining how inaccurate a survey must be before it will be deemed fraudulent. As a result, meritorious claimants have at times been denied title to valuable lakeshore property in cases where there was only a small error in the original plat as to their particular parcel.

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remainder of the lot by a non-meandered lake." *Id.* at 289, 262 N.W.2d 530 (citations omitted).

50. *Id.* at 284, 262 N.W.2d at 528.

51. *Id.* at 284-85, 262 N.W.2d at 528.

52. *Id.* at 285, 262 N.W.2d at 528.

The federal cases which have discussed the issue of constructive fraud have made it clear that exceptions to the conclusive ownership presumption are difficult to establish. One of the earliest cases to find a survey so inaccurate as to defeat the claims of original patentees was *French-Glenn Live Stock Co. v. Springer*,[53] in which one hundred and fifty-eight acres were omitted from the survey. The original survey indicated that the land in dispute was covered by a lake. However, the survey was made at a time when the area was flooded, and no lake actually existed. In finding the error so gross as to justify redistribution of the unsurveyed land, the Supreme Court made it clear that if a lake had existed, the original patentee of the adjoining land would have taken title to the actual shoreline.[54]

Fraud was established in *Security Land & Exploration Co. v. Burns*.[55] The evidence showed that more than two sections of land were left completely unsurveyed because no corners could be located. In the area shown on the plat to be covered by a large lake, there was actually a small lake surrounded by lands that showed no evidence of ever being covered by water. The court held that the entire survey was fraudulent, noting that the actual shoreline was between one-half and one mile away from its purported location on the plat. Other factors considered relevant to the fraud inquiry included the large amount of land claimed compared to the amount of land for which the patentee had actually paid, and the need to go outside a government section line to reach the actual water.

A similar result was reached in *Jeems Bayou Hunting & Fishing Club v. United States*,[56] where the Court found that no survey had ever been made, and held that the unusual "circumstances as well as the extent and character of the lands necessitate the conclusion that the omission was the result of such gross and palpable error as to constitute in effect a fraud upon the government."[57] It thus seems that the error must be

53. 185 U.S. 47, 54 (1902).

54. *See also* Lee Wilson & Co. v. United States, 245 U.S. 24 (1917), where the Court held that the plat should control for the purpose of determining what land was intended to be conveyed, because through fraud or mistake, what was shown on the plat as a body of water was actually upland.

55. 193 U.S. 167 (1904).

56. 260 U.S. 561 (1923).

57. *Id.* at 564. *See also* Internal Improvement Fund v. Nowak, 401 F.2d 708, 716 (5th Cir. 1968).

extreme and unjustifiable in order to give rise to a finding of constructive fraud.

United States v. Zager[58] illustrates the narrow scope of the fraud exception. The case is especially relevant to Wisconsin controversies since the case involved land situated in Forest County. A resurvey indicated that 112.11 acres were erroneously omitted because of an incorrect meander line. The federal government claimed title to 74.56 acres of this land, which it contended had never been transferred. The defendants owned the lots adjoining the omitted acreage and claimed title to the lands situated between their parcels and the water's edge.

Holding that the mistake was not so gross as to constitute constructive fraud, the court looked at the amount and proportion of acreage between the meander line and the shore. It stated that "this must be balanced with 'the circumstances surrounding the original survey, and the type and comparative value of the land at that time'."[59] Both federal decisions and relevant Wisconsin cases were considered. Particular attention was given to the fact that no error involving less than one hundred acres had previously been deemed constructive fraud on the government.[60] The ratio of the surveyed land to the omitted land was approximately two-to-one, and the land had been underestimated by thirty-five percent in the original survey. The court also noted that the land was virtually worthless in 1859 when the plat was accepted. Since the *Zager* court looked to the reasonableness or unreasonableness of the errors, the facts of each case should determine whether the survey is so inaccurate as to have been fraudulent. This analysis puts the conflicting claims into a much better perspective than does a simple comparison of total omitted acreage to an arbitrary figure.[61]

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58. 338 F. Supp. 984 (E.D. Wis. 1972).

59. *Id.* at 989, *quoting* Schultz v. Winther, 10 Wis. 2d 1, 12, 101 N.W.2d 631, 638 (1960).

60. The court noted that the 103 acres involved in Brothertown Realty Corp. v. Reedal, 200 Wis. 465, 227 N.W. 390 (1930) was the smallest amount of acreage deemed sufficient to establish constructive fraud.

61. The *Zager* court determined the percentage figure by dividing the sum of the omitted acreage and the acreage shown on the official plat into the omitted acreage. 338 F. Supp. at 990.

See also Walton v. United States, 415 F.2d 121, 124 (10th Cir. 1969), in which an omission of 323 acres was held to be gross error. The ratio of surveyed land to unsurveyed land was approximately one-to-three.

The Wisconsin decisions, like those of the federal courts, have consistently held that a mistake must amount to a "gross" error in order to constitute fraud. While section 30.10(4)(b)of the Wisconsin Statutes now limits the availability of the fraud exception by providing that only the federal government may bring suit to establish fraud, Wisconsin cases are still illustrative of the type of circumstances which might be sufficient to defeat a variant survey.

In *Brothertown Realty Corp. v. Reedal,*[62] a resurvey disclosed that more than one hundred acres, consisting mostly of narrow strips of lakeshore frontage, had been omitted from the original survey. The plaintiff brought an action to quiet title to 19.37 acres of this land lying between the incorrect meander line and the actual shore. He was shown on the government plat to own 26.2 acres of land bordering the lake. Addressing the question of fraud, the court stated that

> where the original survey line departs so far from the true meander line of a body of water as to leave so large a tract of land unsurveyed as to indicate that the meander line was in fact never run, then the survey will be held invalid as a constructive fraud upon the government.[63]

The court then held that the quantity of land omitted was sufficient to constitute fraud and defeat the original survey. It also declared that all the omitted land must be considered as a whole rather than just that portion of unsurveyed land claimed by the adjoining owners.[64] The disputed parcel must be included with all the adjoining omitted lands and the total of the omitted acreage must then be compared to the sum of the lands lying between the meander line and the actual shore.

This case presents a potential problem for owners of property abutting a narrow strip of technically unsurveyed lakeshore where the aggregate acreage of such unsurveyed lands approaches one hundred acres. An owner could face the possibility of losing the most valuable portion of his tract, regardless of the ratio of unsurveyed land to surveyed land or the distance between the erroneous meander line and the water's edge. The *Reedal* case could be interpreted as yet another contradictory rule for defining the extent of a federal grant because of its conclusion that the original meander line may be

62. 200 Wis. 465, 227 N.W. 390 (1930).
63. *Id.* at 469, 227 N.W. at 392.
64. *Id.* at 470, 227 N.W. at 392.

the border of a particular grant, rather than the actual shoreline.

The effect of *Reedal,* however, was limited considerably by *Lakelands, Inc. v. Chippewa & Flambeau Improvement Co.*[65] The *Lakelands* court engaged in an extensive discussion of the situations where an original survey will be invalidated because of constructive fraud on the government. The owner of land that was shown on the original plat to be bounded by a meandered lake sued his grantor for breach of the covenants of seisin and title under a warranty deed. The government had resurveyed and replatted a portion of land claimed by the plaintiff, who alleged that the resurvey deprived him of fifty-three acres of his property.

Comparing the fifty-three acres involved in the dispute before the court with the 103 acres found to have been fraudulently omitted in *Reedal,* the court stated that *Reedal* represented the "low limit" for a finding of constructive fraud in Wisconsin. As further support for its position, the court noted that the smallest amount of unsurveyed land which the United States Supreme Court considered sufficient to constitute a fraudulent omission was 158 acres in *French-Glen Live Stock Co. v. Springer.*[66] Fortunately, the Wisconsin court did not rely solely upon the quantity of land omitted to make its fraud determination as done in the *Reedal* case. Rather, the court took notice of the fact that the greatest divergence between the erroneous meander line and the shore was less than 900 feet, and held that it was not such a gross departure as to constitute a constructive fraud upon the government.

Perhaps the most significant part of the *Lakelands* decision was the declaration that even where an entire survey is invalidated, "the title to separate parcels designated in the original plat as marked by divisional lines and the meander line is good where there is no such gross departure in the plats of those parcels as to constitute constructive fraud."[67] This language has relieved much of the potential for inequitable redistribution where the ratio of omitted lakeshore to the total acreage of a particular tract is insignificant.

In *Schultz v. Winther*[68] the court again had an opportunity

65. 237 Wis. 326, 295 N.W. 919 (1931).
66. 185 U.S. 47 (1902).
67. 237 Wis. at 338, 295 N.W. at 924.
68. 10 Wis. 2d 1, 101 N.W.2d 631 (1960).

to evaluate an original survey which omitted a large amount of lakefront property. Based on a resurvey conducted in 1955,[69] the government conveyed the land located between the shore and the meander line established by the original government survey of 1863. The plaintiffs brought an ejectment action claiming one of the reconveyed parcels under a patent issued to them in 1956. The defendant claimed superior title to the land in question by an 1872 patent purporting to convey the land up to the meandered lake. Noting that there is no exact formula for making a determination of when an error is so gross as to constitute constructive fraud, the *Schultz* court formulated the two-part test later applied in *Zager*.[70] First, the amount of omitted acreage is compared to the acreage of the tract within the meander line. The court then must determine whether the survey fell below the "proper standard of accuracy," giving due regard "to the circumstances surrounding the orignal survey, and the type and comparative value of the land at that time."[71] Under this analysis, it is very difficult to defeat the title of an adjacent landowner holding under an original United States patent.[72]

CONCLUSION

As a result of the *Kind* and *Thiel* decisions, Wisconsin has reduced much of the uncertainty that has plagued the body of law governing the problem of meandered lakeshore. However, there exists the potential for a reversion back to the early state of confusion. Wisconsin has had a statute in effect since 1931 which provides an excellent mechanism for the equitable dis-

69. 43 U.S.C. § 772 (1970) provides for resurveys to mark undisposed of public lands, but further provides: "No such resurvey or retracements shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement."

See also United States v. Reimann, 504 F.2d 135, 138 (10th Cir. 1974), which held that "once a patent has been issued, the rights of the patentees are fixed and the government has no power to interfere with these rights as by a corrective resurvey."

70. 338 F. Supp. at 989.

71. 10 Wis. 2d at 12, 101 N.W.2d at 638.

72. In State Commissioners of Board of Public Lands v. Thiel, discussed *supra*, at 000-000, the state argued that the error in running the meander lines of a lake constituted constructive fraud. The court held that using the boundaries depicted on the plat, which included the meander line, would enlarge the state's lot rather than limit it. Since the fraud exception is only to be applied where large areas of uplands had been erroneously omitted, the argument was not helpful to the state's case. *See* note 47, *supra*.

tribution of technically omitted lands in a fashion consistent with the federal decisions which define the extent of a federal patent. The courts should rely on *Kind* for guidance in making a fair distribution among adjacent owners with valid but conflicting claims to the land. However, caution must be used to prevent *Kind* from being interpreted as a reinstatement of the older cases as available rules of decision for trial courts to apply as they see fit. In this respect, *Thiel's* strict compliance with section 30.10(4)(b) is important in establishing the proper rules to be followed.

It is clear that when the United States distributes land according to the official plat, and the plat depicts meander lines along the margin of an existing body of water, the actual shoreline defines the extent of the grant. Thus, the owner of land which is shown to abut a lake or stream on the official government plat is presumed, absent a showing of fraud, to hold to the water's edge.

Wisconsin, however, has not confined its jurisdiction to submerged lands within the state, but has actually limited the extent of federal patents by the creation of rules in direct conflict with the federal decisions. Application of section 30.10(4)(b) of the Wisconsin Statutes should preclude the use of these conflicting rules, and provide for a more orderly and equitable distribution of lands situated on erroneously meandered lakes.

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